No. 80-255

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGIA POWER COMPANY, PETITIONER

v.

138.30 ACRES OF LAND AND MILDRED B. SANDERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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This brief is filed on behalf of the United States and the Federal Energy Regulatory Commission in response to the Court's invitation.

QUESTION PRESENTED

Whether the law of the forum state, rather than federal law, should govern the measure of compensation in condemnation proceedings brought in federal district court by a federal licensee under the right of eminent domain conferred by Section 21 of the Federal Power Act, 16 U.S.C. 814.

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STATEMENT

In 1969, petitioner, Georgia Power Company, obtained a license from the Federal Power Commission[1] under 16 U.S.C. 797(e) to construct a dam and hydroelectric generating facility in Georgia (the Lake Wallace project). Pursuant to Section 21 of the Federal Power Act, 16 U.S.C. 814, petitioner then initiated a series of condemnation actions in the United States District Court for the Middle District of Georgia against certain Georgia landowners to acquire land for the project. In *Georgia Power Co.* v. *54.20 Acres of Land*, 563 F. 2d 1178 (5th Cir. 1977) (hereinafter "*Dodson*," the name of one of the landowners in that proceeding), the Fifth Circuit affirmed the district court's ruling that uniform federal law, rather than Georgia law, should control the measure of compensation in the Section 21 proceedings (Pet. App. A53-A98). Approaching the issue as a choice of law question, the court weighed the competing considerations between federal and state law and concluded that the balance tips in favor of federal law since "the use of state law could interfere with achievement of congressional aims" (*id.* at A76).[2] The landowners filed a petition for a writ of certiorari and the Court invited our views. 439 U.S. 814 (1978). In response, the government filed a brief supporting the decision of the court of appeals and urging denial of the petition. The Court thereafter denied certiorari. *Boswell* v. *Georgia Power Co.*, 440 U.S. 907 (1979).

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[1]The Federal Energy Regulatory Commission has succeeded to the functions and responsibilities of the former Federal Power Commission with respect to licensing of hydroelectric facilities on navigable waters under Part I of the Federal Power Act, 16 U.S.C. 792 *et seq.*

[2]The court observed that none of the legislative history "illuminates the choice of law issue" (Pet. App. 61).

Subsequently, in this case, a panel of the Fifth Circuit relied on *Dodson* in concluding that federal law should govern the determination of compensation in Section 21 proceedings (Pet. App. A36-A52; 596 F. 2d 644). However, a petition for rehearing en banc was granted, and the panel opinion was reversed by the en banc court of appeals, four judges dissenting (Pet. App. A1-A35). Beginning its choice of law analysis with a presumption in favor of state law (*id.* at A8), the majority concluded that "the interests of the United States in the determination of the amount of compensation a private licensee must pay a landowner in a condemnation proceeding under Section 21 are not sufficient to warrant displacement of state law on that issue" (*id.* at A13).[3] The dissenters perceived no "sound reason to distinguish between condemnation proceedings brought by the United States and those in which it authorizes its power to be used by its statutory licensee for a federal public purpose" (*id.* at A35).

DISCUSSION

We adhere to the views expressed in response to the Court's invitation in *Boswell* v. *Georgia Power Co.*, *supra*, that federal, rather than state, law should govern in determining just compensation in Section 21 condemnation proceedings brought by federal licensees.

1. Section 21 of the Federal Power Act authorizes licensees—when they cannot obtain by conventional purchase property or other rights necessary to the construction, maintenance, or operation of the licensed works—to acquire such property or rights by eminent domain, either in the district court for the district where the property is located or

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[3]The majority noted that the legislative history "reveals no express congressional intent that federal common law and not state law should supply the federal rule in determining the measure of compensation in condemnation cases brought under Section 21" (Pet. App. A12).

in the state courts.[4] This section further provides that when authorized condemnation actions are brought in federal courts, "[t]he practice and procedure * * * shall conform as nearly as may be with the practice and procedure in similiar action[s] or proceeding[s] in the courts of the State where the property is situated." In *United States* v. *Miller*, 317 U.S. 369, 380 (1943), this Court held that such language does not affect the substantive measure of compensation. The procedural requirements have in any event been superseded by Rule 71A of the Federal Rules of Civil Procedure, governing practice and procedure in condemnation cases.

The substantive law of just compensation varies considerably among the states. Georgia law permits consideration of increases in value created by the project itself. This approach appears to be a localized deviation from the general rule that only loss to the owner, not benefit to the taker, is compensable, and that therefore no increment is allowed for increase in value due to the project unless the property's particular suitability for such uses would in any event affect its ordinary market value. 3 P. Nichols, *The Law of Eminent Domain*, § 8.61 (1976). Rules concerning setting-off of

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[4]A parallel provision appears in Section 7(h) of the Natural Gas Act, 15 U.S.C. 717f(h), authorizing holders of certificates of public convenience and necessity for natural gas pipelines to exercise the right of eminent domain to acquire necessary rights-of-way and land or other property for the construction, operation, and maintenance of such pipelines and related facilities. Much of the property taken by pipeline companies in this context consists only of easements for subsurface rights-of-way, with the fee interest in the surface retained by the landowner (subject to certain restrictions against inconsistent uses). Moreover, in contrast to reservoirs created by hydroelectric projects, which often confer waterfront or scenic benefits on affected property, natural gas pipelines appear to create no offsetting advantages to properties they traverse. Thus, for pipelines, the present issue appears to have little significance, though the costs of acquisition would still be affected by state rules allowing attorney's fees, for example.

"special benefits"[5] conferred on the owner's remaining land against the value of the land taken also vary among jurisdictions. A Georgia statute (Ga. Code Ann. § 36-504 (1970)) prohibiting such a set-off reflects what is said to be the law of 36 states, 13 of which achieve the result by constitutional provision and 23 by statute or judicial construction. 3 P. Nichols, *supra*, at §§ 8.6206, 8.6211[2]-8.6211[51]. Rules concerning recovery of attorney's fees generally depend on specific statutes, which again vary among jurisdictions. 3 Nichols, *supra*, at § 8.64.[6]

In contrast, federal law does not recognize increases in the value of property taken by eminent domain that are created by the project for which the property is taken. *United States* v. *Reynolds*, 397 U.S. 14, 16-18 (1970); *United States* v. *Miller*, *supra*; *Bauman* v. *Ross*, 167 U.S. 548, 584 (1897). It is also established under federal law that any special benefits to a property owner's remaining properties may be off-set against the value of the property taken in the determination of just compensation. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 (1974); *Bauman* v. *Ross*, *supra*, 167 U.S. at 584. Finally, federal law permits recovery of attorney's fees only as specifically provided by statute, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and no statute authorizes the award of

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[5]"[S]pecial benefits" are those that arise from the peculiar relation of the land in question to the public improvement. 3 Nichols, *supra*, at § 8.6203. They contrast with the general benefits to the community at large from completion of the project. *Ibid.* See *Bauman* v. *Ross*, 167 U.S. 548 (1897).

[6]At the time of the court of appeals' decision in *Dodson*, Georgia law provided for the award of reasonable attorney's fees to the condemnee. The Georgia Supreme Court subsequently held that attorney's fees need not be included in the measure of just compensation under the Georgia constitution. *Dekalb County* v. *Trustees, Decatur Lodge No. 1602*, 242 Ga. 707, 251 S.E.2d 243 (1978) (see Pet. App. A6 n.4).

such fees against condemnors in actions under Section 21 of the Federal Power Act.

2. The upshot is that applying state law rules as to the measure of compensation may, as here, substantially increase the cost of projects under the Federal Power Act.

There remains a large potential for new development of hydroelectric power under license from the Commission, and the federal interests[7] in the development of such power may be interfered with by the application of state law which results in higher condemnation costs to the licensee. Of the estimated total national resource of 177 million kilowatts of conventional hydroelectric generating capacity, both developed and undeveloped, as of January 1, 1979, only 61 million kilowatts had been developed.[8] Of the developed capacity, a little more than half was developed by private or non-federal public entities under license from the Federal Energy Regulatory Commission or its predecessor, the Federal Power Commission. (As of September 30, 1979, there were 425 major and 109 minor (2,000 horsepower or less) licenses in effect.) Thus, if past development is any guide, one may assume that a substantial portion of future development will take place on non-federal sites under license from the Commission. Development of these sites would require acquisition of land for construction of dams and reservoirs and related generating and transmission

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[7]The court of appeals identified three federal interests or policies that may be implicated by the federal program at issue: "(1) maximization of hydroelectric development, (2) reduced energy costs, and (3) minimization of costs to the government should it decide to exercise its option to acquire a project at the expiration of the license term, upon payment of 'net investment,' not exceeding 'the fair value' of the property taken, under Section 14(a) of the Federal Power Act, 16 U.S.C. 807(a)" (Pet. App. A17).

[8]These data and those that follow are drawn from the *1979 Annual Report of the Federal Energy Regulatory Commission* (1980).

facilities, as well as for recreational facilities, and for the mitigation of adverse environmental effects.[9]

During the 1979 fiscal year, the Commission received applications for major licenses, amendments, and permits involving approximately 4.57 million kilowatts of new capacity. As of September 30, 1979, the Commission also had pending 94 applications for preliminary permits.[10] Many pending applications may not result in the development of projects; many that do may not involve significant land acquisition problems. But each pending application has the potential for significant land acquisition costs. Moreover, even completed projects may be affected by the Commission's policy concerning recreational developments at licensed projects (see note 9, *supra*), which in some circumstances might require licensees to acquire additional land around the margin of existing reservoirs.[11]

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[9]FPC Order No. 313, 34 F.P.C. 1546, 1549 (1965), declared as a general policy that the Commission expects its licensees "to acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project." 18 C.F.R. 2.7(a).

[10]Preliminary permits are issued "for the purpose of enabling applicants for a license [under Part I of the Federal Power Act] to secure the data and to perform the acts required" to develop the evidence needed to support an application. 16 U.S.C. 797(f). The effect of a preliminary permit is to confer priority of application for a license on the permittee for a period not exceeding three years, while necessary project data are prepared. 16 U.S.C. 798.

[11]In addition, federal policy now seeks to promote the development of small hydroelectric power projects. Title IV of the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3154 *et seq.*, established a federal program for the financing and expeditious authorization of such projects. Section 405 of PURPA, 16 U.S.C. (Supp. III) 2705, provides for simplified licensing procedures by the Federal Energy Regulatory Commission under the Federal Power

Land acquisition costs have averaged about 10 percent of total project costs, or about $1.7 million per project, for all non-federal projects put into operation from 1920 to 1978.[12] For projects put into operation from 1968 to 1978 the land acquisition costs declined to an average of 9 percent of the project costs, but the average land acquisition costs per project rose to $5.5 million. For projects put into operation from 1970 to 1978, the percentage fell to an average of 7.4 percent of project costs, while the average land acquisition cost per project was $4.3 million.

Of course, costs already incurred will not be affected by the resolution of the issue presented in this case. They suggest, however, the substantial sums involved in land acquisition costs for Commission-licensed projects now under planning or construction, as well as for projects that may be licensed by the Commission in the future. Because land costs will in most instances be recovered in the licensee's rates, and because Section 403 of PURPA, 16 U.S.C. (Supp. III) 2703, authorizes the Department of Energy to make loans for up to 75% of the cost of a small hydroelectric project, it may be that few projects will be deferred by increased land costs. But it is not a matter of indifference that ratepayers will be required to bear additional burdens. And it is possible that, in some instances, the costs ultimately will be borne by the federal treasury when the government exercises its option under Section 14 of

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Act. The program is limited to the development of projects that will not require new dams or additional impoundment of water (Section 406, 16 U.S.C. (Supp. III) 2706.); it contemplates projects that will generate power from existing dams not presently used for that purpose. Also, the projects must be limited to facilities having not more than 30,000 kilowatts of installed capacity (Section 408(1), 16 U.S.C. (Supp. III) 2708(1)). Nevertheless, even such small facilities may require additional land acquisition for water conduits, powerhouses, substations, transmission lines, access roads, recreational facilities, and environmental impact mitigation.

[12]U.S. Department of Energy, *Hydroelectric Plant Construction Costs and Annual Production Expenses* (1978) (Pub. No. DOE/EIA 0171).

the Federal Power Act (16 U.S.C. 807) to acquire a project at the expiration of the license.[13]

3. Apart from its potential effects on federally-licensed projects, we believe that the decision below is incorrect. Congress has several alternatives in authorizing the use of eminent domain. It may empower public agencies or private corporations to acquire property and to pay only the amounts required by the Fifth Amendment. See, *e.g.*, *Cherokee Nation* v. *Kansas R.R.*, 135 U.S. 641, 656-657 (1890). It may also authorize the acquisition of property upon payment of more than the amount constitutionally required. See *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 742 (1950); *United States* v. *Fuller*, 409 U.S. 488, 494 (1973); see also Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* Congress might even specify that compensation be measured according to state law. Cf. *DeSylva* v. *Ballentine*, 351 U.S. 570, 580-582 (1956).[14]

The measure of compensation under each eminent domain statute depends on congressional intent. Although the legislative history of Section 21 of the Federal Power Act is silent on the point (see Pet. App. A12), it is reasonable to conclude that Congress intended to delegate to federal licensees the same power of eminent domain generally

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[13]There are eleven projects for which licenses will expire between January 1, 1980 and December 30, 1985, that are subject to federal take-over.

[14]Although the meaning of "property" in the Fifth Amendment normally obtains its content by reference to state law, *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 279 (1943); Board of *Regents* v. *Roth*, 408 U.S. 564, 577, 604 (1972) (majority and concurrence); *Bishop* v. *Wood*, 426 U.S. 341, 344 n.7, 347 n.14 (1976); cf. *Aquilino* v. *United States*, 363 U.S. 509 (1960), the measure of "just compensation" and the admissibility of evidence concerning just compensation are controlled by federal law under the Fifth Amendment in federal condemnations. *United States* v. *Miller, supra*, 317 U.S. at 376-380; *United States* v. *Reynolds, supra*, 397 U.S. at 16-18.

available to the federal government, that is, a power subject only to the Fifth Amendment. The prerogative delegated and used here was, after all, federal power—a pre-existing power whose constitutional limitations were familiar to Congress. If it had been intended to vary the rules or to permit states to do so, it would have been natural to say so. Cf. *FPC* v. Oregon, 349 U.S. 435, 455 (1955). But nothing in the legislative history or the language of the statute suggests that Congress intended any measure of compensation other than that generally available to landowners under the Fifth Amendment.

We recognize that both the panel in *Dodson* and the en banc court in this case held that, because the statute and its legislative history make no express reference to the issue of compensation, there is insufficient evidence of congressional intent to decide the question on that basis. Both decisions, therefore, approached the issue as a choice of law question. If this Court accepts that analysis, legitimate state interests must of course be weighed in the balance. We submit, however, that the significant federal interests predominate and that a uniform federal rule of compensation is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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